No. 02-77

SUPREME COURT, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

DANIEL BARRON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Supervising Deputy Attorney General
STEVEN D. MATTHEWS
Supervising Deputy Attorney General
DAVID E. MADEO
Deputy Attorney General
Counsel of Record
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 897-4925
Fax: (213) 897-2806
Counsel for Respondent

QUESTIONS PRESENTED

1. May law enforcement officers detain a passenger in a vehicle to determine whether he is on probation without any individualized suspicion of criminal wrongdoing?

2. Do search terms imposed under California law purporting to permit a probation search without any individualized suspicion of wrongdoing violate the Fourth Amendment?

3. Does a probationer's acceptance of probation terms, allowing a search of that person, instead of a state prison sentence, constitute a complete waiver of Fourth Amendment rights?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-77

DANIEL BARRON, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

STATEMENT OF THE CASE

Following the denial of his motion to suppress evidence pursuant to California Penal Code section 1538.5, petitioner pled guilty to possession of a controlled substance. Cal. Health & Safety Code § 11350(a). The trial court suspended imposition of sentence and placed petitioner on formal probation for thirty-six months, on the condition, among others, that he serve 120 days in county jail. (CT at 37, 53, 55-66, 70-73; RT at 8-9, 14.)

The California Court of Appeal, Second Appellate District, affirmed the judgment of the trial court. The Court of Appeal found that the trial court properly denied petitioner's motion to suppress evidence. (Petition, Appendix B (Opinion at 2-5).)

Petitioner filed a petition for review in the California Supreme Court, arguing that the trial court erred by denying his motion to suppress evidence, on grounds that the search violated the Fourth Amendment of the United States Constitution. The California Supreme Court denied the petition for review.

(Petition, Appendix A.)

Petitioner filed the instant Petition for Writ of Certiorari (hereinafter "Petition") in this Court on July 9, 2002.

STATEMENT OF FACTS

At approximately 5:50 p.m., on September 15, 2000, Deputy Javier Chavez noticed a car fail to stop at a stop sign in Moorpark. Deputy Chavez stopped the car, which contained two occupants. Petitioner was in the passenger seat, and another person was the driver. Deputy Chavez recognized petitioner from a previous encounter and knew from conducting a field interview with petitioner that he was on probation for narcotics and weapons violations, with terms allowing for search of his property and person. (Supp. CT at 14-17.)

Deputy Chavez asked petitioner if he was still on probation, and petitioner replied that he was. Petitioner and the driver got out of the car, as Deputy Chavez verified with dispatch that petitioner was still on probation with search terms.[1/] Deputy Chavez asked petitioner if he had any objections to being searched, and petitioner responded that he did not have any problem with it. (Supp. CT at 17-19.)

Petitioner was not wearing a shirt, so Deputy Chavez searched petitioner's shorts and then asked him to remove his shoes and socks. When petitioner removed his left shoe, a small item fell out of the shoe, onto the patrol car, and then to the ground. Deputy Chavez retrieved the item immediately and saw that it was a small plastic bindle, brownish in color, containing two small rocks. Deputy Chavez suspected the item was a controlled substance, and petitioner eventually told him it was cocaine. Petitioner was arrested, and lab tests indicated the substance was a usable quantity of cocaine. (Supp. CT at 18-20, 22.)

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1. Petitioner had a consent to search term pursuant to his probation. (CT at 17.)

ARGUMENT

I.

CERTIORARI IS NOT WARRANTED ON PETITIONER'S DETENTION-OF-PASSENGER CLAIM BECAUSE PETITIONER FAILS TO ADDRESS THE ISSUE IN THE PETITION

Petitioner contends in his first question presented that this Court should grant certiorari in order to determine whether law enforcement officers may detain a passenger in a vehicle to determine whether he is on probation without any individualized suspicion of criminal wrongdoing. (Petition at i.) But petitioner fails to address this issue anywhere in the Petition, except in the section entitled, "Questions Presented." (Petition at i.) The Petition contains no showing of why this issue is important or in conflict among various jurisdictions and therefore does not explain how it meets this Court's Rule 10 criteria.

In any event, the officer had reason to believe that petitioner was on probation and subject to search terms, thereby justifying petitioner's brief detention. The record does not indicate any detention, beyond that necessary for the traffic stop, that preceded petitioner's acknowledgment that he was on probation and subject to a search condition. This Court should therefore deny certiorari on petitioner's first question presented.

II.

CERTIORARI IS NOT WARRANTED ON PETITIONER'S PROBATION-SEARCH CLAIM BECAUSE THE CALIFORNIA SUPREME COURT IS CURRENTLY REVIEWING A CASE THAT RAISES THE SAME ISSUE

Petitioner contends in his second question presented that this Court should grant certiorari in order to determine whether probation search terms imposed under California law that permit a probation search without any individualized suspicion of wrongdoing violate the Fourth Amendment. (Petition at 6-9.) This Court should deny certiorari on this issue because the California Supreme Court has granted review in a case where the same issue is being considered.

Prior to 1994, California courts required law enforcement officers to have "reasonable suspicion" that a parolee was violating the conditions of his parole before they could search a parolee's residence pursuant to a parole search condition. *People v. Burgener*, 41 Cal. 3d 505, 536, 224 Cal. Rptr. 112 (1986). However, in *In re Tyrell J.*, 8 Cal. 4th 68, 86, 32 Cal. Rptr. 2d 33 (1994), the California Supreme Court abandoned the "reasonable suspicion" requirement, and held that a juvenile probationer subject to a valid probation search condition "does not have a *reasonable* expectation of privacy over his or her person or property." Therefore, the court found that the Fourth Amendment of the United States Constitution did not require that law enforcement have any type of individualized suspicion that a juvenile probationer was engaged in illegal activity prior to conducting a warrantless search of the probationer's person. *Id.* at 88-89. Further, because the juvenile probationer had no reasonable expectation of privacy, the police were not required to be aware of the existence of the probationer's search condition prior to the search. *Id.* at 87.

The California Supreme Court extended this ruling to

adult parolees in *People v. Reyes*, 19 Cal. 4th 743, 754, 80 Cal. Rptr. 2d 734 (1998), where it held that "even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy 'society is "prepared to recognize as legitimate."'" However, law enforcement officials may not conduct a search that is "arbitrary, capricious or harassing." *Id.* at 752. Pursuant to this logic, the California Supreme Court upheld a warrantless search of a parolee's residence. *Id.* at 756.[2]

But, in *People v. Robles*, 23 Cal. 4th 789, 97 Cal. Rptr. 2d 914 (2000), the California Supreme Court found that a search of a parolee's residence that resulted in the discovery of incriminating evidence against the parolee and his roommate was not justified where the police were not aware of the search condition prior to the search. *Id.* at 799-800. The three concurring justices in *Robles* stated that the court's holding was in tension with its recent case law concerning searches pursuant to probation and parole search conditions. *Id.* at 802-07 (Mosk, J., Kennard, J., Brown, J., concurring). Justice Brown, noting that "*Tyrell J.* has . . . not escaped criticism," argued that "we should avoid endorsing, and thus perpetuating, its dubious reasoning." *Robles*, 23 Cal. 4th at 806 (Brown, J., concurring).

On February 28, 2001, the California Supreme Court granted review in *People v. Sanders*, 23 P.3d 42, 107 Cal. Rptr. 2d 148 (2001). In *Sanders*, the California Court of Appeal found that a warrantless and suspicionless search of a parolee's residence violated the Fourth Amendment. The court stated, "[t]o be sure, our California Supreme Court has provided mixed signals in the way it has resolved *Tyrell J.*, *Reyes*, *Woods*[3] and

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2. The California Supreme Court declined to determine if the police had reasonable suspicion to search the parolee's residence because the prosecution did not press that issue to the court. *Reyes*, 19 Cal. 4th at 747 n.1.

3. *People v. Woods*, 21 Cal. 4th 668, 88 Cal. Rptr. 2d 88

Robles." *People v. Sanders*, formerly published at 84 Cal. App. 4th 1211, 101 Cal. Rptr. 2d 456, 469 (2000). The California Court of Appeal further stated that the "six-year-old 'logic of *Tyrell J.*' has been subject to much criticism," and noted that "we await further guidance from the California Supreme Court on this important issue." *Id.* In the Briefs filed in the California Supreme Court in *Sanders*, the two appellants have argued that *Tyrell J.* and *Reyes* were wrongly decided, and that the California Supreme Court should require law enforcement to have "reasonable suspicion" prior to conducting a warrantless search of a parolee. (Appendix A (Appellant Arlene Dena Sanders' Answer Brief On The Merits at 9-17), and B (Appellant Kenton Michael McDaniel's Answer Brief On The Merits at 7-24).)

Although the California Supreme Court has indicated that probationers with consensual search conditions differ to some extent from parolees (*see Reyes*, 19 Cal.4th at 749-52), there is nevertheless a similarity between the two classes[4/] to

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(1999) [upholding a warrantless search of a probationer's residence that resulted in the discovery of incriminating evidence against the probationer's roommate].

4. In general, both the federal courts of appeal and state courts appear to be in agreement that probationers and parolees have the same "constitutional status" under the Fourth Amendment. *United States v. Grimes*, 225 F.3d 254, 258 (2d Cir. 2000); *United States v. Lewis*, 71 F.3d 358, 361 (10th Cir. 1995); *United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990); *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir. 1988); *Owens v. Kelley*, 681 F.2d 1362, 1367 n.8 (11th Cir. 1982) [there is no difference between the "constitutional status" of probationers and parolees]; *State v. McCullough*, 6 P.3d 774, 779 (Colo. 2000); *State v. Benton*, 695 N.E.2d. 757, 760 n.1 (Ohio 1998) ["[T]here is no material difference between probationers and parolees in the context of constitutional guarantees."]; *Commonwealth v. Williams*, 692 A.2d 1031, 1035

justify the expectation that the California Supreme Court's ruling in the pending *Sanders* case might have a profound impact on probationers as well.

Even when "novel and important constitutional questions" are raised in a petition for writ of certiorari, denial of certiorari is appropriate if the question is being decided by the lower courts. *Carpenter v. Gomez*, 516 U.S. 981, 981 (1995) (Stevens, J., concurring in denial of certiorari). "[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., concurring in denial of certiorari); *see also Smith v. Robbins*, 528 U.S. 259, 275 (2000); *Riggs v. California*, 525 U.S. 1114, 1116 (1999) (Stevens, J., joined by Souter, J., and Ginsburg, J., concurring in denial of certiorari). "[T]he likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals" to review the question first. *Brown v. Texas*, 522 U.S. 940, 943 (1997) (Stevens, J., joined by Ginsburg, J., and Breyer, J., concurring in denial of certiorari).

Given that it appears the California Supreme Court is currently considering challenges to its previous case law in this area, it would be prudent for this Court to decline to grant certiorari in this case. *See Carpenter*, 516 U.S. at 982. Consequently, certiorari should be denied in regards to petitioner's second question presented.

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n.7 (Penn. 1997) [constitutional rights of probationers and parolees are "indistinguishable"]; *State v. Boston*, 889 P.2d 814, 816-17 (Mont. 1995); *see also Gagnon v. Scarpelli*, 411 U.S. 778, 782-83 (1973).

III.

CERTIORARI IS NOT WARRANTED ON PETITIONER'S PROBATION-AS-CONSENT CLAIM BECAUSE IT WAS NOT RAISED IN THE STATE COURTS

Petitioner's third question presented, whether a probationer's acceptance of probation terms, permitting searches instead of a state prison sentence, constitutes a complete waiver of Fourth Amendment rights, was not presented to the lower courts. Therefore, review of petitioner's third question presented would be imprudent since this claim was never factually or legally developed in the lower courts. *See Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990).

Petitioner did not attempt to develop the facts concerning his acceptance of the probation search terms in the trial court. The record discloses only that petitioner consented to a search of his person and property as a condition of his probation. (CT at 17, 23.) The circumstances under which petitioner agreed to the probation search terms, and the legal significance of that consent in regards to a claim that petitioner waived his Fourth Amendment rights, were never litigated below. Rather, in the trial court, petitioner's legal position was simply that, regardless of his acceptance of the probation condition, the officer's search constituted an improper arbitrary intrusion in the absence of any resumption of criminal activity by petitioner. (Supp. CT at 23-24.)

In his Opening Brief in the California Court of Appeal, petitioner challenged the search of his person on the ground that law enforcement needed reasonable suspicion that a probationer has violated the terms of probation before a search is permissible. (Appendix C at 3-5.) Petitioner also claimed that the search was arbitrary and that his detention as the officer ran a probation check violated his Fourth Amendment rights. (Appendix C at 5-14.) He did not raise the issue of whether his acceptance of probation search terms was a waiver of his Fourth

Amendment rights.

It is the longstanding rule of this Court that it will not ordinarily decide issues not raised or resolved in the lower courts. *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 759-60 (1995); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Only in exceptional circumstances are questions not "pressed or passed upon below" reviewed by this Court. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *see also United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Youakim*, 425 U.S. at 234. Petitioner has not argued, and Respondent cannot identify, any "exceptional circumstances" concerning this case that require this Court to ignore its longstanding rule that it will not review an issue that was not developed in the lower courts. Consequently, this Court should deny certiorari in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: November 4, 2002

Respectfully submitted,

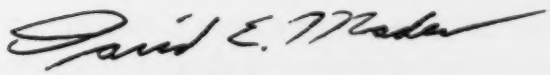
BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Supervising Deputy Attorney General

STEVEN D. MATTHEWS
Supervising Deputy Attorney General



DAVID E. MADEO
Deputy Attorney General
Counsel of Record

Counsel for Respondent

APPENDIX A

DOCKETED
JUL 33 2002

BY P. FROST
No. F__2000DA0025

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ARLENE DENA SANDERS, et al.** **Defendant and Appellant.**	**S094088**

Court of Appeal, Fifth Appellate District, No. F033862
Kern County Superior Court No. 77313

Honorable CLARENCE WESTRA, JR., STEPHEN P. GILDNER, and COLEEN W. RYAN, Judges

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APPELLANT ARLENE DENA SANDERS' ANSWER BRIEF ON THE MERITS

J. Peter Axelrod
Attorney at Law
State Bar No. 53088
1275 Fourth Street, No. 341
Santa Rosa, CA 95404
Telephone: (707) 538-1002

Attorney for Appellant
Arlene Dena Sanders

By appointment of the Supreme
Court of the State of California

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ARLENE DENA SANDERS, et al.** **Defendant and Appellant.**	Supreme Court No. S094088 Court of Appeal No. F033862 Superior Court No. 77313

APPEAL FROM THE SUPERIOR COURT
OF KERN COUNTY
Honorable CLARENCE WESTRA, JR., STEPHEN P. GILDNER, and COLEEN W. RYAN, Judges[1/]

APPELLANT ARLENE DENA SANDERS' ANSWER BRIEF ON THE MERITS

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1. Judge Gildner presided over the change of plea hearing. Judge Westra presided over pronouncement of judgment. Judge Ryan presided over the motion to suppress.

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, Arlene Dena Sanders, respectfully requests that this court affirm the decision of the Court of Appeal below because it was correctly decided.

ISSUES PRESENTED

Issue 1.) Should this court reconsider its holding in *In re Tyrell J.* (1994) 8 Cal.4th 68, 74, that the otherwise illegal search of a minor who is subject to a probation search condition is "not unconstitutional despite the officer's ignorance of the search condition"?

Short Answer: **Yes.** The *Tyrell J.* decision is premised on the theory that a juvenile probationer has no reasonable expectation of privacy from searches that society is prepared to recognize. (*Id.* at pp. 74, 86, 89.) The decision is flawed because, contrary to that holding, a person subject to a search condition has some, albeit significantly diminished, expectation of privacy from searches. (*United States v. Knights* (2001) 534 U.S. 112, ___ 122 S.Ct. 587, 592-593.) Moreover, a search of a person subject to a search condition must be conducted for lawful probation, parole or other legitimate law enforcement purpose. (*United States v. Knights, supra*, 534 U.S. 112, ____, 122 S.Ct. pp. 590-591; *People v. Robles* (2000) 23 Cal.4th 789, 797; *People v. Reyes* (1998) 19 Cal.4th 743, 754; *People v. Bravo*, (1987) 43 Cal.3d 600, 610.) Advance knowledge of a search condition by a searching officer is the only way this can be assured. (Cf. *People v. Robles, supra*, 23 Cal.4th at p. 797 [probation search of residence].) Otherwise, law enforcement officers will be encouraged to search first and ask questions later in the hope that the person or property searched may have

been subject to a search condition. (*In re Tyrell J., supra*, 8 Cal.4th at p. 98 (dis. opn. of Kennard, J.).)

Issue 2.) If the holding in *In re Tyrell J.* remains viable, should it apply to adult parolees who are subject to search conditions?

Short Answer: **No.** The court's decision should strictly limit the holding of *Tyrell J.* to the facts of that case. *Tyrell J.* involved the stop and frisk search of a juvenile at a sporting event. The instant case involves the search of a residence, a place where there is a greater expectation of privacy that society is prepared to recognize. (*People v. Robles, supra*, 23 Cal.4th at pp. 795, 799-800.) As noted, a search conducted of a person or property subject to a search condition must be reasonably related to the legal status of the person that subjects him or her to the search condition, or it must be conducted for some other legitimate law enforcement purpose. (*United States v. Knights, supra*, 534 U.S. 112, 122 S.Ct. pp. 590-591; *People v. Robles, supra*, 23 Cal.4th at p. 797; *People v. Reyes , supra*, 19 Cal.4th at p. 754; *People v. Bravo, supra*, 43 Cal.3d 600, 610.) Without advance knowledge of the search condition, the search is wholly arbitrary because it is without legal justification and without any perceived limits by law enforcement. (*People v. Robles, supra*, 23 Cal.4th at p. 797.) This court should thus reaffirm the rule of *In re Martinez* (1970) 1 Cal.3d 641, 646 that applies an advance knowledge requirement for a search under a parole condition and do so under a rationale similar to that set forth in *Robles*.

Issue 3.) Under the decision in *People v. Robles, supra*, does the admissibility of the fruits of the search in the present case differ as to defendant Sanders, who was not subject to a search condition, as compared to defendant McDaniel, who was?

Short Answer: **Yes.** Respondent notes, "where a search is later justified by after-acquired knowledge of the search

condition, a cotenant has the right to assert that his or her reasonable expectation of privacy has been violated, even though the probationer or parolee does not maintain the same right." (RBOM 23.)[2/] Respondent concedes cotenants enjoy measurably greater privacy expectations than a person subject to a search condition, and acknowledges that the reasoning of *Tyrell J.*, does not apply to a cotenant where the search is justified by after-acquired knowledge that another person in the residence was subject to a search condition. (RBOM 23.)

Appellant Sanders agrees, but suggests the fundamental analysis should be whether the cotenant knows or has reason to know that the person he or she is residing with is subject to a search condition. The rationale for justifying suspicionless searches of parolees is that "[t]he level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored." (*People v. Reyes, supra*, 19 Cal.4th at p. 753.) Absent knowledge that a cohabitant is on parole and subject to a search condition, that rationale has no application to the other cohabitant. Unless the cohabitant is aware of the parolee's status, the cohabitant maintains a reasonable expectation of privacy in the premises that society is prepared to recognize.

STATEMENT OF THE CASE

An information dated May 13, 1999, filed by the Kern County District Attorney charged appellant, Arlene Dena Sanders, and her codefendant, Kenton Michael McDaniel, with a single count of possessing cocaine base for purposes of sale in violation of Health and Safety Code section 11351.5. (CT

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2. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporters Transcript on Appeal. "PR" refers to the probation report. "RBOM"refers to Respondent's New Brief On The Merits.

50-51.) A defense motion to suppress the evidence based on an unlawful search and seizure pursuant to Penal Code section 1538.5 was denied on June 24, 1999. (CT 62.) On June 25, 1999, the information was amended to add count two, possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a). (CT 64.) On the same day, appellant Sanders entered a plea of guilty to count two in exchange for a sentence that included no more than a low term prison commitment of 16 months. (CT 65.)

On August 12, 1999, appellant Sanders was sentenced to prison for a term of 16 months, along with ancillary sentencing provisions and consequences. (CT 68-69, 72.)

On August 13, 1999, she filed a timely notice of appeal. (CT 71.) On November 20, 2000, in a published decision, the Court of Appeal, Third Appellate District, per Wiseman, J. reversed appellant's conviction. Respondent petitioned for review and this court granted review on February 28, 2001. Briefing on the issues described above was ordered on March 27, 2002.

STATEMENT OF FACTS[3/]

On April 6, 1999, appellant Sanders and appellant Kenton McDaniel shared apartment 18 at 1905 California in Bakersfield. (RT 46.) McDaniel was on active parole. His terms of parole included submission to random searches at his home. (RT 6-10.)

On that date, as the manager of the apartment complex returned to the apartments, a tenant informed her there was a fight going on between Sanders and McDaniel in apartment 18. Although the manager had seen no fight or heard no loud voices, she called 911. When police officers Davis and Thatcher arrived, the manager told them Sanders and McDaniel were

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3. Facts are taken from evidence presented at the motion to suppress. The quantity of contraband seized is taken from the probation report.

fighting and pointed out the apartment. (RT 11-12, 36, 38, 44-50.)

Davis and Thatcher went to the apartment and heard male and female voices yelling at one another. (RT 12.) Thatcher knocked on the door but no one immediately answered. (RT 12.) Sanders peaked out of the blinds and the arguing stopped. (RT 13, 27, 39, 41.) A dead bolt was heard being worked. About 15 to 30 seconds later, Thatcher again knocked on the door, identifying the officers as police and demanding that the door be immediately opened. (RT 13-14, 27-28.) Some 15 to 30 seconds later the locking mechanism was again heard and the door opened. (RT 14, 27- 28.) Sanders was standing on the other side of the door. (RT 14.) McDaniel was standing behind her. (RT 15, 40.)

Thatcher remarked Sanders' face was cut. The police entered the apartment, believing there was a domestic violence situation and that the suspect, McDaniel, was standing behind the victim. (RT 15, 41-42.) The mark on Sanders' face was a small abrasion no more than an inch in length and diameter. (RT 21.) The police had seen no aggressive moves by McDaniel against Sanders. (RT 31.) Almost immediately as the police entered the apartment, Sanders said "What the fuck you all doing in my house? Get the fuck out of my house." (RT 29, 41.) McDaniel also told the police he did not want them in the house without a warrant. (RT 29, 32.)

When the police entered, McDaniel was seen stuffing a metallic object beneath the cushions of a sofa.[4/] (RT 15-16, 31, 52.) Soon after the police entered, Sanders began "tussling" or struggling with Thatcher, and pulled out of her shirt in an effort to get away from him. (RT 32, 34-35, 36, 53-55.) McDaniel attempted to get involved, and walked toward Thatcher, telling him to leave Sanders alone. (RT 32.) McDaniel had been pressed against the wall by Davis and attempted to come off it when Thatcher and Sanders were struggling. McDaniel was

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4. A pair of stainless steel scissors with a black handle was later recovered from the couch. (RT 57.)

handcuffed and then put on the couch. (RT 29, 32, 55.) He was handcuffed because the police believed he was a suspect in a spousal abuse situation. (RT 29, 41-42.) Sanders was also handcuffed. (RT 38-39, 53.)

Davis then did a "protective sweep" of the other rooms in the apartment to ensure no one else was in the apartment that could pose a danger. (RT 16-17, 33, 35, 55-56.) In one of the bedroom closets, Davis noticed plastic bags in plain view containing white chunks of suspected cocaine base protruding from a brown work boot. (RT 17-18.) When Davis finished his sweep, he asked McDaniel his parole status, then determined from checking with other police that McDaniel was on active parole. (RT 18-20, 24-25.) A subsequent search with the aid of a canine yielded additional items of cocaine base. (RT 20.) A total of 4.72 grams of a substance containing cocaine base was found and seized. (PR 7.) Male and female clothing was found in the apartment, as was mail addressed to both Sanders and McDaniel. (RT 22-23.)

Sanders was given no medical treatment for the mark on her face before being booked. (RT 57, 65.) She testified that the blemish/cut on her face observed by the police had been there before April 6, 1999, and was from fights that had taken place long ago, not from any fight with McDaniel. (RT 61.) She denied telling police she received the scratch on her cheek because McDaniel followed her out of the apartment and she fell against the stucco wall. (RT 64.) The police did not mention parole until they had gone through all the rooms of the apartment. (RT 63.)

ARGUMENT

I.

THIS COURT SHOULD RECONSIDER AND OVERRULE ITS DECISION *IN RE TYRELL J.*, *SUPRA* , THAT THE OTHERWISE ILLEGAL SEARCH OF A MINOR WHO IS SUBJECT TO A PRORATION SEARCH CONDITION "IS NOT UNCONSTITUTIONAL DESPITE THE OFFICER'S IGNORANCE OF THE SEARCH CONDITION." *IN RE TYRELL J.* CANNOT BE RECONCILED WITH *PEOPLE V. ROBLES, SUPRA*. MOREOVER ONLY IF THE OFFICER IS AWARE OF A SEARCH CONDITION CAN IT BE ASSURED THAT THE SEARCH IS CONDUCTED FOR A PROPER PROBATION OR PAROLE PURPOSE.

"[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., Amend. IV; Cal.Const., art. I, § 13; Pen. Code § 1525.) In determining whether a search was reasonable under the Fourth Amendment, the inquiry focuses on whether the aggrieved party had an expectation of privacy that society is prepared to recognize as reasonable. (See *California v. Ciraolo* (1986) 476 U.S. 207, 211; *Katz v. United States* (1967) 389 U.S. 347, 361.)

Notwithstanding the language of the Fourth Amendment, the importance of the state's interest in public safety through probation and parole supervision justifies searches of those subject to search conditions without a warrant and without probable cause. (See *United States v. Knights, supra*, 534 U.S. 112, ____, 122 S.Ct. 587, 592-593 [probation search]; *Griffin v. Wisconsin* (1987) 483 U.S. 868, 873-876 [probation search]; *People v. Bravo, supra*, 43 Cal.3d 600, 607-609 [probation search]; *People v. Reyes, supra*, 19 Cal.4th at pp. 753-754 [parole search]; *People v. Burgener* (1986) 41 Cal.3d 505, 534,

overruled in part in *People v. Reyes, supra* [parole search].) *In re Tyrell J., supra*, holds that a juvenile probationer subject to a search condition has no reasonable expectation of privacy from searches that society is prepared to recognize. (*Id.* 4 Cal.4th at pp. 74, 86, 89.) The decision has been criticized from the time it was published. For example:

> The reasoning of *Tyrell J.* has also not escaped criticism among the commentators: "Whatever might be concluded about the necessity to permit the police to play some role in the enhanced scrutiny to be directed at those on probation and parole, quite obviously there is no rational basis upon which to uphold otherwise illegal police searches of persons only later determined to be on probation or parole.... Regrettably, that eminently sound position was later abandoned in *In re Tyrell J.* on the bizarre reasoning that a probationer who knows that his subject to 'a valid search condition' to his release consequently 'does not have a reasonable expectation of privacy over his person or property' vis-'a-vis any search by anyone, including a search by a police officer unaware of the probationer status! As the dissent in *Tyrell J.* aptly noted, that strange conclusion, without precedent in any jurisdiction, gives police an incentive to make searches even without probable cause because, should it turn out that the suspect is a probationer, the evidence will be admissible nonetheless." (4 LaFave, Search and Seizure, supra, § 10.10(e), pp. 791-792....)

(*People v. Robles, supra*, 23 Cal.4th at p. 806 (conc. opn. of Brown, J.).)

Appellant urges that this court should reconsider and overrule its opinion in *In re Tyrell J.* because the reasoning in that case is no longer viable. The underlying assumption of *Tyrell J.* is that because the juvenile probationer in that case had

no right to refuse probation and its search condition, and thus did not consent to its imposition, he therefore had no reasonable expectation of privacy from a detention and pat search of his person. (*Tyrell J.* at pp. 86, 88-89.) *Tyrell J.* is wrong in this premise since, as demonstrated below, every probationer and every parolee has some, albeit a reduced, expectation of privacy from searches and seizures under the Fourth Amendment. But even if the holding of *Tyrell J.* is still viable, its application must be narrowly limited to similar searches of the person in public locations and not extended to searches of the residence of a probationer or parolee where a greater expectation of privacy exists.

A. The premise of *Tyrell J.* is wrong because all probationers have some, albeit a reduced, expectation of privacy.

This court has traditionally justified probation searches on the theory that the probationer has consented to the search by agreeing to the search condition. (See *People v. Woods* (1999) 21 Cal.4th 668, 674-675.) *Tyrell J.*'s premise that there is no reasonable expectation of privacy from searches for a juvenile probationer because the juvenile has no right to refuse a probation search condition and thus does not consent to its imposition is wrong. There is a reasonable expectation of privacy from searches, even though significantly diminished, whether a probationer consents to the search condition or not. (*United States v. Knights, supra*, 534 U.S. 112, ____, 122 S.Ct. 587, 591 fn.3, 592, 593; *Griffin v. Wisconsin, supra*, 483 U.S. at p. 872.) Although the United States Supreme Court declined in *Knights* to consider the issue of the constitutionality of a search condition that eliminated any expectation of privacy altogether, or a completely suspicionless search (*Knights* at 122 S.Ct. p. 592, fn.6), its upholding of the California search condition in that case was expressly based on its finding of a diminished expectation of privacy resulting from the search condition and the presence of reasonable suspicion for the

probation search. The high court held that the Fourth Amendment

> ...requires no more than reasonable suspicion to conduct a search of this probationer's house. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. [Citation]. Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. [Citations.] Those interests warrant a lesser than probable cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable. ¶ The same circumstances that lead us to conclude that reasonable suspicion is constitutionally sufficient also render a warrant requirement unnecessary.

(*Id.* at 534 U.S. ____, 122 S.Ct. pp. 592-593.) Significantly, in *Knights* the searching detective was aware of the probation search condition. (*Id.* at 122 S.Ct p. 589.) *Knights* also holds that a probation search may be conducted for purposes of monitoring probation, as well as for some other law enforcement purpose. (*Id.* at122 S.Ct. pp. 590-591.) *Knights* declined to decide whether accepting the search condition amounted to consent to a waiver of Fourth Amendment rights, instead analyzing the case in terms of whether the search was reasonable within the Fourth Amendment under the totality of the circumstances. (*Id.* at 122 S.Ct. p. 591.)

In *Tyrell J.*, this court refused to impose an advance knowledge requirement of a search condition because the juvenile probationer had no reasonable expectation of privacy, and because doing so would be inconsistent with the juvenile probation scheme. (*Tyrell J. supra*, 8 Cal.4th at pp. 86-87.) If a probationer has reduced, rather than no, expectation of privacy through a search condition whether consented to or not as *Knights* implies, then a fundamental underpinning for the *Tyrell J.* decision no longer exists.

Moreover, if a reasonable suspicion is required to conduct a probation search as *Knights* also suggests, it follows that the officer conducting the search must know of the probation search condition. Otherwise, the officer would not be able to articulate the predicate fact of a probation search condition in order to justify a warrantless search.[5] Even if no reasonable suspicion is required to search a probationer, an officer still must, as a matter of sound Fourth Amendment logic, be aware of the existence of the search condition in order to justify the search on that basis.

> [U]nder the Fourth Amendment the police may not rely on a probation search condition of which they are unaware to justify a warrantless search. To permit them to do so, thereby encouraging them to "search first and ask questions later," is completely at odds with the Fourth Amendment's purpose of protecting persons and their possessions against unreasonable government intrusion. (*Tyrell J.*, at p. 98 (dis. opn. of Kennard, J.).)

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5. If a reasonable suspicion is required as *Knights* implies it might be, this court's holdings that a reasonable suspicion or reasonable cause is no longer required for either a probation search or a parole search as long as the search is not arbitrary, capricious or harassing, would no longer be viable. (*People v. Reyes, supra*, 19 Cal.4th at pp. 753-754 [parole]; *People v. Bravo supra*, 43 Cal.3d at pp. 610-611 [probation].)

(*People v. Robles, supra*, 23 Cal.4th at p. 803 (conc. opn. of Kennard, J.).) Conversely, requiring an officer to have knowledge of a search condition would have the desirable effect of encouraging law enforcement to refrain from conducting searches that would otherwise be objectively unreasonable.

This court in 1970 held that in order for a search to be legally justifiable as a parole search, the officer must be aware of the search condition. (*In re Martinez, supra*, 1 Cal.3d 641 at p. 646.)

> [R]egular police officers undertook the search pursuant to their general law enforcement duties; the officers, at the time of the search, did not even know of defendant's parole status. The investigation involved suspected criminal activity, not parole violations. Under these circumstances the officers cannot undertake a search without probable cause and then later seek to justify their actions by relying on the defendant's parole status, a status of which they were unaware at the time of their search.

(*Ibid.*)

In declining to impose an advance knowledge requirement of a search condition on a searching officer, *Tyrell J.* distinguished *Martinez*, reasoning that since there is now an automatic imposition of the search condition for parolees, there is no longer any reasonable expectation of privacy from searches by police. (*Tyrell J.* at 8 Cal.4th pp. 88-89.) As noted, *United States v. Knights, supra*, suggests there is at least some, although diminished, expectation of privacy in a person who is subject to a search condition. (*See id.* 122 S.Ct. pp. 592-593.) If so, an officer must have advance knowledge of the search condition in order to ensure the search is conducted for a legitimate probation, parole or other proper law enforcement purpose. An even stronger argument exists that advance knowledge must be required if a reasonable suspicion is required in order to justify a search pursuant to a probation or

parole search condition. Otherwise, an officer would be permitted to conduct a search without a warrant fully aware that not the slightest justification existed to search on the offhand chance the search would later be upheld on the ground the defendant was subject to a search condition.

Respondent dismisses the dissent of Justice Kennard in *Tyrell J.*, arguing that it rests on "presumptions which are not necessarily correct" and "the fears expressed there have not come to pass." (RBOM 12.) On the contrary, the fears expressed in the dissent are precisely what happened in this case -- officers searched first and asked questions later. The same thing happened in the *Robles* case. Nor does respondent's contention that the exclusionary rule or civil remedies are sufficient to ameliorate any violation withstand even modest scrutiny. *Tyrell J.*, by holding there is no reasonable expectation of privacy from searches by a juvenile probationer that society is prepared to recognize, encourages Fourth Amendment violations by officers. Rather than providing a bright line rule that all persons must be presumed to have the same Fourth Amendment rights absent knowledge to the contrary, officers may now search knowing there is no reasonable, articulable basis on which the search may be upheld in the hope that the person searched may be subject to a search condition. The law should be designed to avoid Fourth Amendment violations, not merely to remedy violations once they have occurred.

Respondent further argues that the dissent in *Tyrell J.* ignores the limitation that probation searches may not be conducted in a harassing, arbitrary or capricious manner. The problem with this argument is that it still permits an otherwise unlawful search to be conducted, i.e., a search for an improper purpose, but the search may not rise to the level of being arbitrary, harassing or capricious. A probation search without a warrant can only be accomplished for a legitimate probation purpose or some other legitimate law enforcement purpose if the officer is first aware of the search condition.

Respondent cites a number of cases where officers had no advance knowledge of a search condition, including the instant

one and *Robles*, and points out that the officers in those cases had reasons, even though legally insufficient, for conducting the searches. Respondent contends because the officers had reasons, they were not conducting random, unconstitutional searches and then attempting to justify them with after acquired knowledge of a search condition. (RBOM 13.) Appellant perceives little, if any, difference between a legally insufficient reason and no reason. Moreover, it is naive to believe that any officer would willingly acknowledge he or she is randomly conducting unconstitutional searches in the hope the search may later be justified by a search condition. No officer would knowingly subject himself to civil liability for constitutional torts. (See *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388.) There will always be a proffered reason for a search, even though deficient. Again, the issue is whether a search is conducted for a legitimate probation or parole purpose, or some other legitimate law enforcement purpose. Absent prior knowledge of the search condition, it cannot be conducted for legitimate purposes.

Respondent also notes that *Tyrell J.* is no longer the only case in the country sanctioning a search on the basis of a search condition without advance knowledge of a search condition. *Anderson v. Commonwealth of Virginia* (VA 1998) 507 S.E2d 339 upheld a search based on consent to a search condition notwithstanding the officer's lack of knowledge. Anderson holds:

> Finally, we find meritless any contention that the officers' lack of prior knowledge of Anderson's waiver rendered the search invalid. The waiver expressly states that Anderson agreed to submit his person or property to "any law enforcement officer." (Emphasis added.) Indeed, Anderson concedes on brief that the waiver "did not have to be related to the supervision of [his] probation."

(*Id.* 507 S.E.2d at p. 342 [original emphasis].) Anderson fails to

offer any analysis for its conclusion other than the language of the waiver and the concession of the defendant. The issues of whether the search was justified on the basis of consent, or whether the defendant had a reasonable expectation of privacy, are not addressed at all. The slim reasoning in Anderson does little to support the *Tyrell J.* decision. Indeed, it is not even cited. Simply because *Tyrell J.* now has a brother in another jurisdiction, it is no less an orphan.

B. *In re Tyrell J.* cannot be reconciled with *People v. Robles, supra*, except on the basis that a probationer has a reduced expectation of privacy at his or her home, but no expectation of privacy for items on his or her person when away from home.

In *People v. Robles, supra*, this court recognized that the rule of *Tyrell J.* had limits:

> As our decisions indicate, searches that are undertaken pursuant to a probationer' s advance consent must be reasonably related to the purposes of probation. [Citation.] Significantly, a search of a particular residence cannot be "reasonably related" to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence. Moreover, if officers lack knowledge of a probationer' s advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority.

(*Robles* at 797.)[6]

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6. Even *Tyrell J.* indicates that advance knowledge of a probation search condition is desirable. It "helps ensure that

Robles and *Tyrell J.* are facially inconsistent and logically irreconcilable. The only effective way to differentiate them is to overrule the holding of *Tyrell J.* and require that advance knowledge of a search condition must always exist in order to justify a warrantless search on that basis. Alternatively, the holding of *Tyrell J.* should be strictly limited to its facts, i.e., to searches of a juvenile's person at a public event, and not applied to residences. This second option, while not as desirable as the first, would at least be consistent with the principle noted in *Robles* that a probationer has a greater expectation of privacy in his home. (*People v. Robles, supra*, 23 Cal.4th, at pp. 795, 799-800.)

II.

THIS COURT'S HOLDING IN *IN RE TYRELL J.*, *SUPRA*, THAT ADVANCE KNOWLEDGE OF A SEARCH CONDITION IS UNNECESSARY SHOULD NOT BE APPLIED TO ADULT PAROLEES SUBJECT TO A SEARCH CONDITION BECAUSE THE RATIONALE OF *PEOPLE V. ROBLES, SUPRA*, WHICH PROHIBITS PROBATION SEARCHES OF A RESIDENCE WITHOUT ADVANCE KNOWLEDGE OF THE SEARCH CONDITION, APPLIES WITH EQUAL FORCE TO PAROLE SEARCHES. MOREOVER, ANY DISTINCTION BETWEEN A RESIDENTIAL PROBATION SEARCH AND A RESIDENTIAL PAROLE SEARCH IS ONE WITHOUT A DIFFERENCE.

A strong reason for not imposing an advance knowledge

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the resulting search is not conducted 'for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes.'" (*Tyrell J.*, at p. 87, quoting *People v. Bravo, supra*, 43 Cal.3d at p. 610.)

requirement in *Tyrell J.* was the unique goals of the juvenile justice system in California:

> "Moreover, imposing a strict requirement that the searching officer must always have advance knowledge of the search condition would be inconsistent with the special needs of the juvenile probation scheme. That scheme embraces a goal of rehabilitating youngsters who have transgressed the law, a goal that is arguably stronger than in the adult context. (Cf. Welf. & Inst. Code, § 202, subd. (b) [acknowledging 'the "rehabilitative objectives" of the juvenile law] with Pen. Code, § 1170, subd. (a)(l) ["The Legislature finds and declares that the purpose of imprisonment for crime is punishment].) To better effectuate the rehabilitation of the juvenile, the condition of probation permitting police (and others) to conduct warrantless searches is imposed by the juvenile court to serve the important goal of deterring future misconduct. A juvenile probationer must thus assume every law enforcement officer might stop and search him at any moment. It is this thought that provides a strong deterrent effect upon the minor tempted to return to his antisocial ways.

(*Tyrell J.* at 8 Cal.4th pp. 86-87 [original brackets].) In spite of this language, the rationale of *Tyrell J.* was extended to adult parole searches in *People v. Reyes, supra*, insofar as it held that a reasonable suspicion was no longer required to search an adult parolee. (*Reyes, supra*, 19 Cal.4th at pp. 751-752.) The "logic" of *Tyrell J.* applied "equally, if not more so to parolees." (*Id.* at p. 751.) *Reyes* did not address whether knowledge of a parolee's status was required to conduct a search pursuant to parole search condition, presumably because the officers in *Reyes* had knowledge of the defendant's parole status. (*Id.* at pp. 746-747.)

Whatever justification may have existed for *Reyes* applying the *Tyrell J.* reasoning to adult parolees to overrule the

reasonable suspicion requirement for parole searches, its rationale does not extend to permitting residential adult parole searches absent advance knowledge by law enforcement of the parole search condition.

A private residence is afforded a greater expectation of privacy than, for example, a search of a juvenile's person at a football game as in *Tyrell J.* "'[Private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.' [Citations.]" (*People v. Robles, supra*, 23 Cal.4th at p. 795.) *Robles* held that advance knowledge was required of the probation search condition in that case. It stated, in part:

> ... the principal purpose of the exclusionary rule 'is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.'" [Citations.] In *Tyrell J.*, we concluded that dispensing with a strict 'knowledge-first' rule would not encourage law enforcement officials to engage in warrantless searches of juveniles because they would be '[taking] the chance' that if the target of a search is not subject to a search condition, any contraband found will be inadmissible in court. [Citation.] Although police officers therefore have sufficient incentive to avoid an improper search of a person (*ibid.*), residential searches present an altogether different situation.

(*People v. Robles, supra*, 23 Cal.4th, at pp. 799-800.) As in *Robles*, appellant Sanders was in her home where she had a reasonable expectation of privacy that society was prepared to recognize. Whether the search is sought to be justified pursuant to a probation search condition as in *Robles*, or the parole search condition of her roommate McDaniel, the result is still the same. Her Fourth Amendment rights were violated because there is no

meaningful distinction between a probation search as in *Robles* and a parole search as present here when applied to a residence. If advance knowledge of the search condition was required to search the residence if McDaniel had been on probation, it was likewise required if he was subject to a search condition as a result of parole.

In *Robles*, officers searched the defendant's residential garage without a warrant. Later, they discovered that the defendant's brother, a cohabitant of the residence, was on probation subject to a search condition and sought to justify the search on that basis. This court held that probation searches "must be reasonably related to the purposes of probation," a requirement that cannot be met "when the officers involved do not even know of a probationer who is sufficiently connected to the residence." (*Id.* 23 Cal.4th at p. 797.) "Moreover, if officers lack knowledge of a probationer' s advance consent when they search the residence, their actions are wholly arbitrary in the sense that they search without legal justification and without any perceived limits to their authority." (*Ibid.*) *Robles* rejected an argument that *Tyrell J.* and *People v. Woods, supra* (upholding a search pursuant to a known probation search condition against a person sharing the probationer's residence), should validate the search:

> Contrary to the People's argument, *People v. Woods, supra*, 21 Cal.4th 668 [88 Cal.Rptr.2d 88, 981 P.2d 1019], does not support the proposition that police officers may lawfully enter a residential premises, without a warrant and without any awareness of a resident's probation search condition, to indiscriminately search for and seize evidence of suspected criminal wrongdoing. As our decisions indicate, searches that are undertaken pursuant to a probationer's advance consent must be reasonably related to the purposes of probation.

(*Robles, supra*, 23 Cal.4th at pp. 796-797.)

Prior to *Tyrell J.*, this court's 1970 decision in *People v. Martinez, supra*, made it evident the same rationale quoted above extended to parole searches. (*Martinez, supra*, 1 Cal.3d at p. 646.) This court should extend the rationale of *Robles* to parole searches and reaffirm the rule of *Martinez* because there is, in reality, no significant realistic difference between parole or probation search conditions. The only discernable difference at all between the two kinds of search conditions is their origin. The former are imposed automatically. (See *In re Tyrell J., supra*, 8 Cal.4th at pp. 88-89.) The latter are imposed under a theory of consent. (*People v. Woods, supra*, 21 Cal.4th at pp. 674-675.) This distinction, however, no longer has any significance. As noted above, *United States v. Knights, supra*, upheld a probation search condition as reasonable under the Fourth Amendment without deciding the issue of consent. (*Id.* 122 S.Ct. at pp. 591, 592, fn.6, 593.) Whether an adult probationer consented to a search condition is thus irrelevant.

Even if consent to a probation search condition is necessary, however, the distinction is still one without a meaningful difference. Both probation and parole search conditions have the same end result - a probationer or parolee has a reduced expectation of privacy and is subject to searches for valid parole, probationary or other legitimate law enforcement purposes. (*People v. Reyes, supra*, 19 Cal.4th 743, 754; *People v. Bravo, supra*, 43 Cal.3d at p. 610.) In logic, the theory under which a search condition is imposed has nothing to do with the ultimate question for resolution, i.e., whether the search condition has been invoked within the parameters of the Fourth Amendment. Applying this reasoning, if an officer must have advance knowledge under *Robles* of a probation search condition in order to search a residence without a warrant, advance knowledge of a parole search condition must likewise be required to search the residence of a parolee.

III.
A PERSON WHO COHABITS A RESIDENCE WITH A PERSON WHO IS SUBJECT TO A SEARCH CONDITION HAS A REASONABLE EXPECTATION OF PRIVACY IN THE PREMISES THAT SOCIETY IS PREPARED TO RECOGNIZE AS LEGITIMATE. ONLY WHERE THE COHABITANT CAN BE CHARGED WITH KNOWLEDGE OF THE OTHER RESIDENT'S SEARCH CONDITION IS THE EXPECTATION OF PRIVACY REDUCED.

Respondent concedes that

> "where a search is later justified by after-acquired knowledge of the search condition, a cotenant has the right to assert that his or her reasonable expectation of privacy has been violated, even though the probationer or parolee does not maintain the same right.

(RBOM 23.) Respondent further concedes, quoting *People v. Robles, supra*, 23 Cal.4th 798-799, that such cotenants "'enjoy measurably greater privacy expectations in the eyes of society'" than the person subject to the search condition. The reasoning of *Tyrell J.*, which focused on the reasonableness of the probationer's privacy expectations, does not apply to a cotenant where the search is justified by after-acquired knowledge that another person in the residence was subject to a search condition. (RBOM 23.)

Appellant Sanders agrees, but believes the operative analysis should be whether the cotenant knows or has reason to know that the person he or she is residing with is subject to a search condition. The rationale for upholding probation searches as applied to cotenants versus parole searches involving cotenants must also be examined.

"It long has been settled that a consent-based search is

valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary. (*People v. Woods, supra*, 21 Cal.4th 668, 675.) "The 'common authority' theory of consent rests 'on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' [Citation]." (*Id.* at p. 676.) In *Woods*, a probation search condition was held to be advance consent to a search conducted pursuant to that condition and enforceable against others at the residence not subject to a search condition. (*Id.* at p. 681.)

As argued above, consent now appears irrelevant in probation search cases in light of *United States v. Knights, supra*. Even if the consent theory for imposition of a probation search condition still has some vitality, it has no application in a parole case. A parolee does not consent to imposition of a search condition. It is imposed automatically. (*In re Tyrell J., supra*, 8 Cal.4th at pp. 88-89.) A consent theory is thus not available to sustain a parole search. Moreover, even probation searches that may be justified on a theory of consent have limits:

> [I]f persons live with a probationer, common or shared areas of their residence may be searched by officers aware of an applicable search condition. [Citations.] Critically, however, cohabitants need not anticipate that officers with no knowledge of the probationer's existence or search condition may freely invade their residence in the absence of a warrant or exigent circumstances. Thus, while cohabitants have no cause to complain of searches that are reasonably and objectively related to the purposes of probation -- for example, when routine monitoring occurs [citation] or when facts known to the police indicate

> a possible probation violation that would justify' action pursuant to a known search clause [citation] – they may legitimately challenge those searches that are not. *Tyrell J.*, which focused specifically on the reasonableness of a probationer's privacy expectations, does not indicate otherwise.

(*People v. Robles, supra*, 23 Cal.4th at pp. 798-799.)

While *Robles* involved a probation search and the instant case involves a parole search, once again appellant Sanders perceives no difference as far as its application here except that consent is not available as a rationale for the search. Like *Martinez*, *Robles* stands for the proposition that for there to be a legitimate search based upon a search condition, the officers must be aware of the search condition. Otherwise, the search is not related to a legitimate probation or parole purpose and is arbitrary. Indeed, *Robles* appears to make this very point:

Allowing the People to validate a warrantless residential search,

> after the fact, by means of showing a sufficient connection between the residence and any one of a number of occupants who happens to be subject to a search clause, would encourage the police to engage in facially invalid searches with increased odds that a justification could be found later. It also would create a significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification.

(*Id.* at p. 800.) As the court below correctly observed:

> ... McDaniel's parole status cannot be used to validate the search with regard to Sanders. Sanders had a reasonable expectation of privacy in her residence. Further, the search was not conducted pursuant to a known search clause, and was not motivated by

> rehabilitative, reformative or legitimate law enforcement or parole purposes. Therefore, the search cannot stand as a valid parole search with respect to her. The People appropriately concede this in their supplemental brief.

(*People v. Sanders* (2000) reprinted at 84 Cal.App.4th 1211, 1228.)

Here, appellant Sanders, who was not on parole or subject to a search condition, was in her residence at the time of the unconsented to police intrusion. The record contains no evidence she was even aware McDaniel was on parole. Yet, in spite of respondent's concession Ms. Sanders had a reasonable expectation of privacy in the premises and the search was unlawful as to her, respondent still maintains, "because she shared the apartment with McDaniel, she had a reduced expectation of privacy." (RBOM 20.) Respondent's assertion begs the question of how one can have a reduced expectation of privacy without knowledge a cohabitant is subject to a search condition.

Absent evidence appellant Sanders knew of McDaniel's search condition, there is no basis for an argument she knowingly and voluntarily assumed any risk of a search by being a cohabitant of the residence. The rationale for justifying suspicionless searches of parolees is that "[t]he level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored." (*People v. Reyes, supra*, 19 Cal.4th at p. 753.) Without knowledge that a cohabitant is on parole and is subject to a search condition, that rationale can have no application to the cohabitant. Accordingly, in addition to the rationale advanced by respondent, there is another reasonable basis for distinguishing between a parolee who is subject to a search condition and a cohabitant unaware of the search condition.

Respondent cites *Russi v. Superior Court* (1973) 33 Cal.App.3d 160 for the proposition that it would make no

difference whether a person who resides with a person subject to a search condition was aware of the search condition or not. (RBOM 20-21.) *Russi* contains the following language:

> Whether or not petitioner knew of the probationary condition is also irrelevant because just as his cotenant could not limit his right to possess and enjoy (or relinquish) the whole or any part of the common property [citation] he cannot limit her coexistent and coequal rights. If the cotenancy had existed at the time she gave her consent, he could not have prevented her action by the claim that his civil rights might be affected thereby. If he subsequently assumed his relationship with the probationer, his newly acquired status did not create a right for him to limit the effect of the consent already given. If the entry was valid as to Miss Reed, his lack of knowledge of the existence of the limitation of privacy that attached to the common residence, does not serve to create an abuse of police power and transform lawful police activity to the unreasonable and lawless activity that effectuates the constitutionally compelled rules of exclusion.

(*Id.* at p. 171.) The probationer in *Russi* had agreed to a search condition and the officers were aware of the search condition. (*Id.* at p. 164.) The language quoted above makes it clear that it was the probationer who effectively gave advance consent to the officers' search of the residence. This is consistent with *People v. Woods, supra*, 21 Cal.4th 668, which holds such a search is justified on the basis that the probationer, having common authority over the premises, may consent to the search in advance.[7] (*Id.* 21 Cal.4th at pp. 675-676.) The *Russi* language

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7. As noted above, the consent theory for a probation search insofar as it applies to a probationer now appears to be irrelevant in light of *United States v. Knights, supra*, which

respondent relies on is thus dicta, and not essential to the holding of the case. In any event, the relevant inquiry for one who is not subject to a search condition who lives with a person who is subject to a search condition is whether there is a reasonable expectation of privacy in the premises that society is prepared to recognize as reasonable. (See *California v. Ciraolo, supra*, 476 U.S. 207, 211.) It is axiomatic that a person has a reasonable expectation of privacy in his or her residence. (See *People v. Robles, supra*, 23 Cal.4th at p.795.) Absent knowledge that a cohabitant is subject to a search condition, that expectation of privacy remains reasonable, undiminished and one that society, and this court, should recognize as reasonable. Given the totality of the circumstances here present, the search as applied to appellant Sanders was unreasonable under the Fourth Amendment.

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upholds a probation search under the theory it is reasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, appellant Sanders prays that this court affirm the decision of the Court of Appeal. Specifically, appellant Sanders urges the court to overrule its decision of *Tyrell J.*, *supra*, and to reaffirm the rule of *In re Martinez*, *supra*. Should this court find that *Tyrell J.* is still viable, appellant urges the court to find the holding is not applicable to parole searches taking place in one's home, and to extend the rule of *People v. Robles, supra*, to such searches. Finally, should the court rule that *Tyrell J.* applies to adult parolees, the court should hold that *Tyrell J.* may not be used to sanction the search of a person's residence who lives with a parolee absent evidence that the person is aware of the cohabitant's parole status.

Respectfully submitted,

Dated: July 17, 2002

[Signature]
J. Peter Axelrod

Attorney for Appellant
Arlene Dena Sanders

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is PMB 341, 1275 Fourth Street, Santa Rosa, California, 95404. On July 18, 2002, I served the attached **APPELLANT ARLENE DENA SANDERS ANSWER BRIEF ON THE MERITS** by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelopes in the United States Mail at Santa Rosa, California, with postage thereon fully prepaid. There is delivery service by the United States Postal Service at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244,
representing respondent
People on appeal

Elizabeth M. Campbell
Staff Attorney
Central California Appellate
Program
2407 J Street, Suite 301
Sacramento, CA 95816,
representing appellant
Kenton Michael McDaniel

Central California
Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816-
4736

Kern County Superior Court
Hon. Clarence Westra, Judge
1415 Truxton Avenue
Bakersfield, CA 93301

Arlene Dena Sanders
101 Garnsey Ave. #F
Bakersfield, CA 93309

Kenneth K. Cooley
Attorney at Law
1415 18th St. , Suite 307
Bakersfield, CA 93301,
representing
Appellant Arlene D.
Sanders at trial

Kern County District
Attorney
1215 Truxton Avenue,
Room 406
Bakersfield, CA 93301,
representing Respondent
People at trial

Clerk, Court of Appeal
Fifth Appellate District
2525 Capital Street
Fresno, CA 93721

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 18, 2002 at Santa Rosa, California.

[Signature]
J. PETER AXELROD
Declarant